Office-Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 85-31

In The

Supreme Court of the United States

October Term, 1984

BUENTA M. OWENS and KENNETH R. OWENS, on behalf of themselves and all others similarly situated,

Appellees/Cross-Appellants,

v.

MARGARET M. HECKLER, Secretary of Health and Human Services,

Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

*Gill Deford
Neal S. Dudovitz
Peter Komlos-Hrobsky
Sally Hart Wilson
National Senior Citizens
Law Center
1636 W. 8th Street
Suite 201
Los Angeles, CA 90017
(213) 388-1381

Eileen P. Sweeney
National Senior Citizens
Law Center
1302 18th Street, N.W.
Suite 701
Washington, D.C. 20036
(202) 887-5280

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the district court erred in restricting class membership by not including others similarly situated who, during the period from January 1, 1979 through December 31, 1983, inclusive, were also denied survivors' benefits through the operation of the provisions held unconstitutional.

2. Whether the district court erred in denying appellees'/cross-appellants' motion for attorneys' fees under the Equal Access to Justice Act pending resolution of the appeal on the merits.

PARTIES TO THE PROCEEDINGS

The appellees/cross-appellants (hereinafter, "plaintiffs") are Buenta M. Owens and Kenneth R. Owens. The appellant/cross-appellee (hereinafter, "defendant" or "Secretary") is Margaret M. Heckler, the Secretary of Health and Human Services.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
A. THE STATUTORY SCHEME	5
1. Class actions in cases brought pursuant to 42 U.S.C. § 405(g)	5
2. Fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)	6
B. PROCEEDINGS IN THIS CASE	6
1. Class	6
2. Fees	9
I. IF THE COURT NOTES PROBABLE JURISDICTION OVER THE SECRETARY'S APPEAL OF THE CLASS ISSUE, IT SHOULD ALSO ASSERT JURISDICTION OVER PLAINTIFFS' CROSS-APPEAL ON THE CLASS ISSUE.	10
II. ON THE FEES APPEAL, THE COURT SHOULD EITHER REFER THE APPEAL TO THE APPELLATE COURT OR HOLD THE APPEAL UNTIL THE APPEAL ON THE MERITS IS RESOLVED AND THEN REFER IT TO THE APPROPRIATE COURT.	12
CONCLUSION	14
Appendix A	App. 1a
Appendix B	App. 3a
Appendix C	App. 5a
Appendix D	App. 6a

TABLE OF AUTHORITIES

Page

CASES:

Califano v. Yamasaki, 442 U.S. 682 (1979) 5

Heckler v. Edwards, 104 S.Ct. 1532 (1984) 3, 4, 11, 13

League of Women Voters of California v. F.C.C., 751 F.2d 986 (9th Cir. 1985) 4, 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 7, 8

McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983) 3

Montana Contractors' Association v. Kreps, 442 U.S. 935 (1979) 3

United States v. Raines, 362 U.S. 17 (1960) 4

Weinberger v. Salfi, 422 U.S. 749 (1975) 7

STATUTES AND RULES:

Title 28, United States Code,

§ 1252 ..... 4, 11, 12, 13

§ 1361 2

§ 2412(d) 3, 6, 9

§ 2412(d)(1)(A) 4, 6

§ 2412(d)(1)(B) 4, 6, 9

Title 42, United States Code,

§ 405(g) 2, 4, 5, 7, 12, 13

§ 1303 7

Pub. L. No. 96-481, 94 Stat. 2321 et seq.

§ 204(c), 94 Stat. 2329 6

§ 208, 94 Stat. 2330 6

TABLE OF AUTHORITIES—Continued

Page

Federal Rules of Civil Procedure,

Rule 23 5

Rule 23(a) 5, 7

Rule 23(b) 5

Rule 23(b)(2) 7

Rule 59 10

Rules of the Supreme Court of the United States,

Rule 12.4 4

MISCELLANEOUS:

Brief for the Petitioner in Heckler v. Edwards, No. 82-874 3

Motion of Federal Appellees to Dismiss or Affirm in Montana Contractors' Association v. Kreps, No. 78-1546 3

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1984

—o—

BUENTA M. OWENS and KENNETH R. OWENS, on behalf of themselves and all others similarly situated,

Appellees/Cross-Appellants,

v.

MARGARET M. HECKLER, Secretary of Health and Human Services,

Appellant/Cross-Appellee.

—o—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

—o—

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

—o—

OPINIONS BELOW

The district court's order certifying the class (Appendix to Secretary's Jurisdictional Statement (hereinafter, "Sec.App."), 13a-28a) is reported in the CCH Unemployment Insurance Reporter, at ¶ 16,050.

The district court's original decision on the merits, granting the Secretary's motion for summary judgment (Sec.App., 1a-12a), is unreported. On October 5, 1984, the district court granted plaintiffs' motion for reconsideration (Sec.App., 29a). The court held the challenged provisions unconstitutional (Sec.App., 30a-43a) in an order reported in the CCH Unemployment Insurance Reporter,

at ¶ 15,798. Likewise, the judgment entered December 26, 1984 (Sec.App., 44a-46a) is reported in the CCH Unemployment Insurance Reporter, at ¶ 15,893.

———o———

JURISDICTION

1. In these consolidated actions, plaintiffs challenged the constitutionality of certain provisions of the Social Security Act. They alleged jurisdiction pursuant to 28 U.S.C. § 1361 and 42 U.S.C. § 405(g). The district court exercised its jurisdiction under § 405(g). (See Sec.App., 15a-16a & n.3.)

2.a. The order certifying the class was entered August 28, 1984 (Sec.App., 13a-28a), and the order amending the class definition (Cross-appellants' Appendix (hereinafter, "App."), *infra*, 1a-2a) was filed October 5, 1984. Judgment was entered December 26, 1984, and denial of the Secretary's motion to alter or amend that judgment (Sec.App., 47a) was entered on February 6, 1985.

The Secretary filed a notice of appeal to this Court on March 7, 1985 (Sec.App., 48a), and an amended notice of appeal on March 8, 1985 (Sec.App., 49a).[1] Cross-appellants filed a timely notice of appeal to the Ninth Circuit Court of Appeals on April 5, 1985 (App., *infra*, 3a-4a) to

---

[1] The Secretary's Jurisdictional Statement, at 1, and her Appendix, at 49a, are in error in listing the date of the filing of the amended notice of appeal as March 9, instead of March 8.

challenge the district court's restriction of the class size. That is appeal No. 85-5785 in the Court of Appeals.[2]

b. After entry of judgment, plaintiffs timely moved for an award of attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). In an order entered April 1, 1985 (App., *infra*, 5a), the district court denied that motion without prejudice, holding that plaintiffs should renew the motion if the pending appeal on the merits was resolved in their favor. Plaintiffs timely appealed that decision to the Ninth Circuit on May 30, 1985 (App., *infra*, 6a-7a). That is appeal No. 85-5943.[3]

---

[2] Plaintiffs filed the notice of appeal to the Court of Appeals as a protective measure. In *Montana Contractors' Association v. Kreps*, 442 U.S. 935 (1979), the record discloses that the plaintiff, which was successful below on the merits, filed a cross-appeal to this Court on a nonconstitutional issue after the government filed a notice of appeal on the merits. See Motion of Federal Appellees to Dismiss or Affirm, No. 78-1546; see also Brief for the Petitioner in *Heckler v. Edwards*, No. 82-874, at 15-17. No appeal was filed in the Court of Appeals, however. When the government did not perfect its appeal, this Court dismissed the cross-appeal " for want of jurisdiction," and the cross-appellant had no forum for its appeal.

[3] Plaintiffs were compelled to appeal that decision because of their uncertainty as to whether the district judge could exercise jurisdiction over their fees motion after resolution of the appeal on the merits. Although he stated that he was denying the motion without prejudice to renew, it is not clear that, under the EAJA, he can retain jurisdiction. The Ninth Circuit strictly construes the EAJA to require that fees motions be filed within thirty days of final judgment in the district court, *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983), and plaintiffs are concerned that that holding may preclude their returning to the district court upon resolution of the appeal on the merits. Accordingly, they filed a protective appeal with the Ninth Circuit. For the reasons discussed *infra*, at 13-14, they are also cross-appealing to this Court on the fees issue.

3. The Secretary filed her jurisdictional statement on June 5, 1985. Plaintiffs' counsel received it on June 10, 1985. This cross-appeal is being docketed pursuant to Supreme Court Rule 12.4 within 30 days of June 10.

4.a. This Court's jurisdiction over the class action aspect of this cross-appeal exists pursuant to the second paragraph of 28 U.S.C. § 1252. See *Heckler v. Edwards*, 104 S.Ct. 1532, 1538 (1984); *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960).

b. Plaintiffs believe that this Court may also have jurisdiction over their cross-appeal on the denial of fees pursuant to § 1252. The Ninth Circuit, however, has expressly ruled in identical circumstances (based on its analysis of *Edwards*) that a fees appeal should not proceed directly to this Court; rather, it should be taken in the first instance to the Court of Appeals. *League of Women Voters of California v. F.C.C.*, 751 F.2d 986, 989-990 (9th Cir. 1985). But if that decision is ultimately reversed, and if plaintiffs in this case have not taken their fees appeal both to this Court and to the Court of Appeals, they could lose their right of appeal in that instance as well. Accordingly, they have cross-appealed to this Court on that issue.

———o———

STATUTORY PROVISIONS INVOLVED

At issue in the class appeal is section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which is reproduced in the Secretary's Appendix at 55a-57a. At issue in the fees appeal is 28 U.S.C. § 2412(d) (1) (A), (B), which is reproduced in the Appendix, *infra*, at 8.

STATEMENT OF THE CASE

A. THE STATUTORY SCHEME

1. Class actions in cases brought pursuant to 42 U.S.C. § 405(g).

As the Secretary has explained in her Jurisdictional Statement, at 6, a claimant for benefits under the Social Security Act is entitled to seek administrative review of an adverse decision. If still dissatisfied with the Secretary's determination, a claimant then has the right to file a complaint for judicial review in the district court.

The Secretary has established by regulation that each stage of the administrative process should be initiated within 60 days of the adverse prior decision which the claimant is challenging. Section 405(g) itself provides a statute of limitations, also of 60 days, for the filing of the complaint in district court.

Rule 23 of the Federal Rules of Civil Procedure authorizes a court to certify a case to proceed as a class action when the four requirements of Rule 23(a) are satisfied and when one of the three provisions of Rule 23(b) are met. The first component of subsection (a), known as "numerosity" or "impracticability", requires a showing that "the class is so numerous that joinder of all members is impracticable. . . ."

Nothing in Rule 23 or in 42 U.S.C. § 405(g) precludes the certification of a class in cases in which the district court exercises jurisdiction pursuant to that provision. This Court has expressly held that, where the requirements of Rule 23 are satisfied, class actions are certifiable in cases brought pursuant to § 405(g). *Califano v. Yama-*

saki, 442 U.S. 682, 699-701 (1979). If a class is certified, however, relief may only flow to members of the class; any others, even though identically situated, are not entitled to the benefits deriving from the action.

2. Fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

Under the relevant part of the Equal Access to Justice Act ("EAJA"), subsection (d) of 28 U.S.C. §2412, a court must award attorneys' fees to a prevailing party who files an application "within thirty days of final judgment in the action", *id.,* § 2412(d) (1) (B), "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.,* § 2412(d) (1) (A). The statute provides no other basis for a court to deny fees to a prevailing party; if the government's position was not justified and if there were no special circumstances, "a court *shall* award" the fees. *Id.,* § 2412(d) (1) (A) (emphasis supplied).

Subsection (d) was effective for all actions "pending on, or commenced on or after," October 1, 1981. Pub. L.No. 96-481, § 208, 94 Stat. 2330. Although it was automatically repealed on October 1, 1984, it remained applicable "through final disposition of any action commenced before the date of repeal." *Id.,* § 204(c), 94 Stat. 2329.

B. PROCEEDINGS IN THIS CASE

1. Class

a. In an interrogatory answer, the Secretary stated that "approximately one hundred eighteen surviving divorced spouses who have remarried at age 60 or thereafter, and who meet all other eligibility requirements, were denied benefits between July 1, 1982 and June 30, 1983."

Based on this information, which supported their contention that the class was sufficiently large to render joinder impracticable, plaintiffs filed a motion to certify a nationwide class, consisting of all those denied survivors' benefits under the challenged provisions for the period from January 1, 1979 through December 31, 1983, inclusive. (See Sec.App., 15a.)

b. On August 28, 1984, after extensive briefing and a hearing, the district court certified a nationwide class, holding that the four components of Rule 23(a) were satisfied and that, as injunctive and declaratory relief were appropriate for the class as a whole, Rule 23(b)(2) was met. (*Id.* at 24a-26a.) The district court held that a nationwide class was appropriate (*id.*, at 27a-28a), rejecting the Secretary's contentions that 42 U.S.C. § 1303 prohibited class certification (*id.* at 26a-27a) and that § 405(g) forbade inclusion of individuals residing outside the judicial district in which the complaint was filed. (*Id.*, at 22a-23a.)

The district court also held that the class members had satisfied "the only purely jurisdictional element of section 405(g)", the presentation of their claim. (*Id.* at 16a.) It rejected the Secretary's argument that certification should be denied because class members had failed to exhaust their administrative remedies. Relying on *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) and *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), it noted that the requirement was not jurisdictional and that it could be waived by either the Secretary or by the Court. (*Id.* at 17a.) Since the Secretary had herself provided by regulation for waiving the requirement in constitutional challenges, and had expressly granted a waiver to the named plaintiffs in this

case, the district court held that the Secretary had waived exhaustion for the class members. (*Id.* at 17a-18a.)

The court held in the alternative that this was an appropriate case, under the further exception delineated in *Eldridge,* for the court to exercise its authority to waive exhaustion. (*Id.* at 18a-19a.) Since the only issue was constitutional, and the Secretary's position on the issue was clear, "to require such exhaustion would be futile and serve no judicial or administrative interest." (*Id.* at 19a.)

The Secretary's final challenge to the scope of the class was based on the "60-day rule". Although observing that the rule was waivable by the Secretary (*id.* at 20a), the district court determined that the class in this case had to be limited to those who had complied with the 60-day rule. (*Id.* at 21a.)

The court further observed, however, that, "like all statutes of limitations, the 60-day limitation period is subject to tolling." (*Id.* at 21a.) It therefore held that the period was tolled for the 60 days prior to the filing of the complaint; that is, any applicant whose claim was still "alive" in the administrative process, or who could still have filed a complaint for judicial review, should be a member of the class. The court then extended the tolling period to a date sixty days prior to the date on which Mrs. Owens filed her request for reconsideration. (*Id.* at 21a-22a.) This holding is the basis for the Secretary's appeal. See Jurisdictional Statement, at 22-24.

Thus, although the court did not restrict the class as the Secretary requested, it refused to certify a class consisting of all those affected by the challenged provisions. While plaintiffs sought to include everyone denied bene-

fits pursuant to the challenged procedure during the five-year period in which the unconstitutional provisions were in effect (1979-1983, inclusive), the court limited the class to those who had live claims on or after August 20, 1982, the sixtieth day prior to the date on which Mrs. Owens filed her reconsideration request.[4]

2. Fees

a. The complaints in this consolidated action were filed on April 19, 1983 (No. 83-2436) and January 10, 1984 (No. 84-0154). Accordingly, §2412(d) is applicable.

The Secretary's motion to alter or amend was denied on February 6, 1985, so that the judgment on the merits and on class certification became final on that date. On March 6, 1985, plaintiffs filed an application for an award of fees pursuant to 28 U.S.C. §2412(d). The application alleged that plaintiffs were the prevailing parties and that the government's position was not substantially justified, as required by the statute. *Id.*, §2412(d)(1)(B). It was accompanied by a memorandum supporting plaintiffs' arguments and by affidavits of plaintiffs' principle attorneys attesting to their hours worked and rates sought. *Id.*, §2412(d)(1)(B). The Secretary opposed the motion on the grounds that the government's position was substan-

---

[4] The district court's actual order of certification contained a technical error. (See Sec.App., 28a.) Although the court had ruled that exhaustion was not required, the order limited the class in part to those who had *"completed the administrative appeal process* following a denial of such application on or after August 20, 1982." (Emphasis supplied.) Plaintiff moved to eliminate this apparent requirement of exhaustion, and the Secretary did not oppose the motion. Accordingly, on October 5, 1984, the district court entered an amended order which eliminated this error. (App., *infra*, at 1a-2a.)

tially justified and that there were special circumstances. The Secretary did not challenge either the rates or hours claimed by plaintiffs' attorneys.

b. On April 1, 1985, after a hearing, the district judge entered an order denying the motion for fees. He did not, however, rule in the government's favor on the grounds suggested by the government, that its position was justified or that there were special circumstances. Instead, he "denied the motion w/o prejudice to renew after the Supreme Court rules." (App., *infra,* 5a.) As plaintiffs have pointed out, however, the EAJA may not permit the district court to reassert jurisdiction upon the completion of appellate review on the merits. See *supra,* at 3n.2. Accordingly, plaintiffs have appealed to both this Court and the Court of Appeals from the denial of fees in order to protect their right to proceed in some court with jurisdiction over their application or the appeal of its denial.

I. IF THE COURT NOTES PROBABLE JURISDICTION OVER THE SECRETARY'S APPEAL OF THE CLASS ISSUE, IT SHOULD ALSO ASSERT JURISDICTION OVER PLAINTIFFS' CROSS-APPEAL ON THE CLASS ISSUE.

As plaintiffs will explain in their responsive pleading to the Secretary's Jurisdictional Statement, this Court should summarily affirm the district court's decision on the merits. Although the Secretary argues at length that prior decisions of this Court precluded the district court from holding the statute unconstitutional, the district court carefully considered—on three occasions[5]—the applicabil-

---

[5] Those occasions were the cross-motions for summary judgment, plaintiffs' Rule 59 motion, and defendant's Rule 59 motion.

ity of the same cases cited by the Secretary in this appeal and the validity of the Secretary's arguments. If this Court does summarily affirm, then the purposes of 28 U.S.C. § 1252 would not be served by an exercise of jurisdiction over the Secretary's class appeal. Accordingly, that appeal should be dismissed. Cf. *Heckler v. Edwards, supra,* 104 S.Ct., at 1538-41.

In the event that this Court does follow that course, the same analysis suggests that this Court lacks jurisdiction over plaintiffs' cross-appeal. *Id.,* at 1538. In that circumstance, therefore, they would not urge this Court to review their cross-appeal; rather, they should be permitted to pursue their appeal on the issue to the Ninth Circuit.

If this Court does determine to exercise jurisdiction over the Secretary's appeals on the merits and on the class issue, however, it must also assert jurisdiction over plaintiffs' cross-appeal on the class issue. The second paragraph of 28 U.S.C. §1252 requires that all cross-appeals to appeals brought to this Court pursuant to the first paragraph of that section should proceed in this Court. This Court has recently reaffirmed that that is the proper construction of these provisions. See *Heckler v. Edwards, supra,* 104 S.Ct., at 1538 & n.12. As this Court observed, there is considerable logic in requiring all appeals from the same case to be heard by one court, even if some of the issues do not have constitutional implications:

> "When we consider the whole case, we are not only implementing Congress's jurisdictional intent expressed in paragraph two of 28 U.S.C. §1252. We are also exercising judicial discretion to administer

> our caseload to secure the just, speedy, and inexpensive determination of actions."

Id., at 1538 n.12.

In this situation, it is especially appropriate that plaintiffs' cross-appeal be consolidated with the government's appeal on the class issue. The appeals are directed to the same issue: the proper interpretation of §405(g) in the context of class actions. There would be little logic in this Court evaluating the district court's decision to extend the scope of the class beyond the parameters suggested by the Secretary, but declining to consider the degree of that extension.

Accordingly, both the language and purpose of 28 U.S.C. §1252 require this Court to exercise jurisdiction over plaintiffs' cross-appeal on the class issue. If the Court declines to exercise jurisdiction over the government's appeal on the class issue, however, plaintiffs' cross-appeal should be referred to the Court of Appeals for review.

II. ON THE FEES APPEAL, THE COURT SHOULD EITHER REFER THE APPEAL TO THE APPELLATE COURT OR HOLD THE APPEAL UNTIL THE APPEAL ON THE MERITS IS RESOLVED AND THEN REFER IT TO THE APPROPRIATE COURT.

For the same reasons discussed in the class appeal section of this statement, see *supra,* at 10-11, the Court should refer the fees cross-appeal to the Court of Appeals if the Court summarily affirms the district court's decision on the merits. Congress did not intend this Court to resolve

the collateral question of a prevailing party's right to fees merely because the issue already decided on the merits involved the constitutionality of a statute. See *Edwards*, 104 S.Ct., at 1540-41.[6]

If the Court does accord plenary review to the appeal on the merits, however, different considerations are raised than in the cross-appeal on the class issue. Plaintiffs have acknowledged that they are uncertain whether this Court can or should exercise jurisdiction over the fees issue. See *supra*, at 4. The literal language of § 1252 suggests that it should take jurisdiction, but this Court has expressly held that the literal reading of that provision "'would not be consistent with the "sense of the thing". . . .'" *Edwards*, 104 S.Ct., at 1538 (citations omitted). Moreover, the Ninth Circuit has held that, even when a direct appeal on the merits is taken under §1252, the fees appeal should still go to the Court of Appeals. *League of Women Voters of California v. F.C.C*, *supra*.

Whatever the logic of that position, however, this Court has not ruled on the matter and plaintiffs are un-

---

[6] In the similar context discussed in *Edwards*, where the decision on the merits was not appealed, the Court made it clear that § 1252 did not authorize jurisdiction over peripheral matters, with attorney's fees specifically cited: "If we were to adopt respondent's construction . . . , this Court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fees awards or pendent claims arising under state law—matters that would typically fail to meet our criteria for discretionary review." 104 S.Ct., at 1541.

certain as to the proper forum for their appeal.[7] This appeal was therefore taken as a protective measure, so that, if plaintiffs are successful in defending the decision on the merits, they will not be deprived of their right to pursue their application for fees in some court. Accordingly, plaintiffs do not urge this Court to undertake plenary review of the district court's denial of fees. Rather, they suggest that, if the Court undertakes full review of the Secretary's appeal, it should refer the fees appeal to the Court of Appeals for its consideration. That referral could be made either at the time the Court decides whether to hear this case, or at the conclusion of the appeal. The important point is that plaintiffs not be denied their opportunity to press their claim for fees because of the peculiar jurisdictional setting of this case.

Of course, if this Court determines that it should accord plenary review to the fees issue as well, plaintiffs are prepared to defend their contention that the district court erred in denying their motion for fees. It would appear more appropriate, however, that this issue first be considered in the lower courts.

———————o———————

CONCLUSION

If the Court summarily affirms on the merits, it should refer both aspects of the cross-appeal to the Court of Appeals for its review.

---

[7] The matter is rendered the more complex because it is unclear whether the district judge has retained jurisdiction; consequently, plaintiffs' very *right* to appeal the denial of fees, to either this Court or the Court of Appeals, is itself an issue. See *supra*, at 3n.3.

If the Court accords plenary review to the government's appeal, it should

1) note probable jurisdiction over plaintiffs' cross-appeal on the class issue; and

2) refer plaintiffs' cross-appeal on the fees issue to the Court of Appeals for review, either retaining it during consideration of the other portions of the appeal, or referring it immediately to the Court of Appeals.

DATED: July 8, 1985

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
PETER KOMLOS-HROBSKY
EILEEN P. SWEENEY
SALLY HART WILSON

Attorneys for Appellees/ Cross-Appellants

APPENDIX A

Entered Oct. 5, 1984

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, et al,

Plaintiffs,

v.

MARGARET HECKLER, etc.,

Defendants.

CV 84-0154-WMB

KENNETH R. OWENS, et al.,

Plaintiffs,

v.

MARGARET HECKLER, et al.,

Defendants.

ORDER AMENDING CERTIFICATION OF CLASS
(Filed October 5, 1984)

The definition of the certified class is amended as follows:

"All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c) (1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any

month after December, 1978, *provided that* such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982."

DATED: Oct. 4, 1984.

/s/ Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX B

GILL DEFORD
NEAL S. DUDOVITZ
PETER KOMLOS-HROBSKY
National Senior Citizens Law Center
1636 West 8th Street, Suite 201
Los Angeles, California 90017
(213) 388-1381

EILEEN P. SWEENEY
National Senior Citizens Law Center
1302 18th Street, N.W., Suite 701
Washington, D.C. 20036
(202) 887-5280

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV83-2436WMB(Mx)
CV84-0154WMB(Bx)

BUENTA M. OWENS, et al.,

Plaintiffs,

v.

MARGARET HECKLER, etc.,

Defendant.

KENNETH R. OWENS, et al.,

Plaintiffs,

v.

MARGARET HECKLER, etc.,

Defendant.

NOTICE OF APPEAL

(Filed April 5, 1985)

NOTICE IS HEREBY GIVEN that plaintiffs Buena Owens and Kenneth Owens, on behalf of themselves and all others similarly situated, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Order entered in this consolidated action on February 6, 1985.

DATED: April 5, 1985.

Respectfully submitted,

By /s/ GILL DEFORD
NEAL S. DUDOVITZ
PETER KOMLOS-HROBSKY
EILEEN P. SWEENEY

Attorneys for Plaintiffs

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

CV83-2436-WMB
Case No. CV84-154-WMB Date April 1, 1985

Title: Buenta Owens, et al v. Margaret Heckler, etc.
Kenneth Owens, et al. v. Margaret Heckler, etc.

DOCKET ENTRY

PRESENT:

HON. Wm. Matthew Byrne, Jr., Judge.

D. Hostetter	Ferlecia Richards
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Gill Deford

ATTORNEYS PRESENT FOR DEFENDANTS:
George Wu, AUSA

PROCEEDINGS:

Plaintiffs' motions for an award of fees. Counsel are present and the motion is argued to the Court. Court finds motion was timely filed, but the motion is denied w/o prejudice to renew after the Supreme Court rules.

MINUTES FORM 11
CIVIL-GEN

D-M

Initials of Deputy Clerk /s/ dh

APPENDIX D

GILL DEFORD
NEAL S. DUDOVITZ
PETER KOMLOS-HROBSKY
National Senior Citizens Law Center
1636 West 8th Street, Suite 201
Los Angeles, California 90017
(213) 388-1381

EILEEN P. SWEENEY
National Senior Citizens Law Center
1302 18th Street, N.W., Suite 701
Washington, D.C. 20036
(202) 887-5280

Attorneys for Plaintiffs

May 30 8:40 AM '85
Clerk U.S. District Court
Central Dist. of Calif.

By

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV83-2436WMB(Mx)
CV84-0154WMB(Bx)

BUENTA M. OWENS, et al.,

Plaintiffs,

v.

MARGARET HECKLER, etc.,

Defendant.

KENNETH R. OWENS, et al.,

Plaintiffs,

v.

MARGARET HECKLER, etc.,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs Buenta Owens and Kenneth Owens, on behalf of themselves and all others similarly situated, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order entered in this consolidated action on April 1, 1985 denying plaintiffs' motion for attorney's fees.

DATED: May 30, 1985.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
PETER KOMLOS-HROBSKY
EILEEN P. SWEENEY

By /s/ GILL DEFORD
Attorneys for Plaintiffs

APPENDIX E

28 U.S.C. § 2412(d)(1)

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

Supreme Court, U.S.
FILED
OCT 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-31

In the Supreme Court of the United States

OCTOBER TERM, 1985

BUENTA M. OWENS AND KENNETH R. OWENS, ET AL., CROSS-APPELLANTS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE MCINTYRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

10 pp

QUESTIONS PRESENTED

1. Whether, in this nationwide class action challenging the constitutionality of certain provisions of the Social Security Act, the district court correctly excluded from the class individuals who no longer had live claims for benefits pending before the Secretary of Health and Human Services when this suit was filed.

2. Whether the district court erred in denying cross-appellants' application for attorney fees, without prejudice to their renewing it after this Court has ruled on the merits of the Secretary's direct appeal.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Grace v. *Burger*, 763 F.2d 457 11

Heckler v. *Edwards*, No. 82-874 (Mar. 21, 1984) 9, 10

Heckler v. *Lopez*, 464 U.S. 879 6

League of Women Voters v. *FCC*, 751 F.2d 986 ..... 8, 9, 10

McQuiston v. *Marsh*, 707 F.2d 1082 7

Soriano v. *United States*, 352 U.S. 270 6

United States v. *Kubrick*, 444 U.S. 111 6

Statutes and rules:

Equal Access to Justice Act, 28 U.S.C. 2412 :

28 U.S.C. 2412(d) 4

28 U.S.C. 2412(d)(1)(A) 6

28 U.S.C. 2412(d)(1)(B) 7

28 U.S.C. 2412(d)(2) 7

Page

Statutes and rules—Continued:

Pub. L. No. 99-80, 99 Stat. 183 *et seq.* :

§ 2, 99 Stat. 184 7

§ 7(a), 99 Stat. 186 8

28 U.S.C. 1252 ..... 2, 4, 8, 9, 10, 11

28 U.S.C. 1291 8

42 U.S.C. 405(g) 3, 5, 6

Sup. Ct. Rules:

Rule 12.4 5

Rule 15.1(h) 5

Miscellaneous:

H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985) 8

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-31

BUENTA M. OWENS AND KENNETH R. OWENS,
ET AL., CROSS-APPELLANTS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH
AND HUMAN SERVICES

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, moves that the judgment and order of the district court challenged by cross-appellants be affirmed.

OPINIONS BELOW

The order of the district court certifying the class (84-1905 J.S. App. 13a-28a) is unreported. The order of the district court denying cross-appellants' motion for attorney fees (85-31 J.S. App. 5a) is unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (84-1905 J.S. App. 30a-43a) is unreported.

JURISDICTION

The judgment of the district court (84-1905 J.S. App. 44a-46a) was entered on December 20, 1984, and the order of the district court denying the Secretary's motion for reconsideration (84-1905 J.S. App. 47a) was entered on February 6, 1985. The notice of appeal to this Court was filed on behalf of the Secretary on March 7, 1984 (84-1905 J.S. App. 48a), and an amended notice of appeal was filed on March 9, 1985) (84-1905 J.S. App. 49a). The order of the district court denying cross-appellants' application for attorney fees was entered on April 1, 1985 (85-31 J.S. App. 5a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the Secretary's direct appeal to and including June 5, 1985 and the direct appeal was docketed on that date. The cross-appeal was docketed on July 5, 1985. See Sup. Ct. R. 12.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

The Secretary of Health and Human Services has filed a direct appeal (No. 84-1905) under 28 U.S.C. 1252 in this case, challenging (i) the district court's invalidation of provisions of the Social Security Act in effect between 1979 and 1983 that permitted widowed spouses, but not surviving divorced spouses, to receive survivors benefits if they remarried after reaching age 60; and (ii) the district court's granting of relief to unnamed class members who did not exhaust their administrative remedies or who received a final decision of the Secretary denying their claims more than 60 days prior to the filing of this action. The statutory and regulatory framework and the statement of the case are set forth in the jurisdictional statement (at 2-11) filed in No. 84-1905.

1. In this cross-appeal, cross-appellants first challenge the district court's denial of their motion to include additional claimants in the nationwide class to which the court

awarded relief. See 85-31 J.S. 6-9, 10-12. The district court included in the class all those surviving divorced spouses who remarried after age 60 and who either filed applications for survivors benefits on or after August 20, 1982, or filed applications for benefits prior to August 20, 1982 that were still pending at some level of the administrative review process on that date. August 20, 1982 was selected because it was 60 days prior to the date on which one of the class representatives, Buenta Owens, filed her request for administrative reconsideration of the initial denial of her claim for benefits. In the district court's view, this administrative request by a single claimant sufficiently put the Secretary on notice of the nature of the constitutional contention that the filing of that request should be deemed to have tolled the running of the 60-day period during which any similarly situated claimant in the United States could file an action for judicial review under 42 U.S.C. 405(g). 84-1905 J.S. App. 20a-22a.

Cross-appellants argued in district court that the class should be defined even more broadly to include every claimant who was denied benefits on the basis of the challenged statutory provisions at any time during the four-year period beginning on January 1, 1979. See 85-31 J.S. 8-9. As cross-appellants acknowledge (*ibid.*), the district court necessarily rejected that contention when it certified a class with a beginning date of August 20, 1982.

2. Cross-appellants also seek review of the district court's denial without prejudice of their application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). See 85-31 J.S. 12-14. On March 6, 1985, within 30 days of the date on which the district court's judgment became final by virtue of that court's denial of the Secretary's motion for reconsideration, cross-appellants filed a motion for attorney fees. Cross-appellants argued that they were entitled to fees because they were the

prevailing parties and because, in their view, the Secretary's position in defending the constitutionality of the challenged statutory provisions and opposing the district court's award of relief to a nationwide class was not "substantially justified" within the meaning of 28 U.S.C. 2412(d). 85-31 J.S. 9-10. In a brief order dated April 1, 1985, the district court denied the motion for attorney fees, without prejudice to cross-appellants' right to reapply for fees after this Court rules on the merits of the Secretary's direct appeal (85-31 J.S. App. 5a).

ARGUMENT

The issues raised in this cross-appeal are so insubstantial as not to warrant plenary review by this Court. The Court therefore should summarily affirm the judgment of the district court insofar as it rejects cross-appellants' motion to include within the class persons who did not have claims for benefits pending on August 20, 1982, and it also should summarily affirm the district court's April 1, 1985 order denying cross-appellants' motion for attorney fees.

1. Cross-appellants assert (85-31 J.S. 11-12) that the Court should note probable jurisdiction of their cross-appeal on the class certification issue, if it notes probable jurisdiction of the Secretary's direct appeal insofar as it challenges the class certification.[1] However, cross-appellants present no argument on the merits of their cross-appeal on the class certification issue, thereby wholly failing

---

[1]Cross-appellants first argue (85-31 J.S. 12-13), however, that the Court does not have jurisdiction of the Secretary's direct appeal under the first paragraph of 28 U.S.C. 1252 or of their cross-appeal under the second paragraph of Section 1252 insofar as those appeals challenge the district court's class certification. Cross-appellants argue that this Court has jurisdiction under Section 1252 only over the constitutional issues in the case. Cross-appellants make this same argument in their motion to dismiss or affirm (at 23-26) the Secretary's direct appeal in No. 84-1905. We have sufficiently answered that argument in our reply brief (at 5-7) in No. 84-1905 and in our discussion at pages 8-11, *infra*, of the Court's jurisdiction of the appeal from the district court's denial of attorney fees.

to explain how the district court could have had jurisdiction under 42 U.S.C. 405(g) over persons whom it declined to include in the class. Cross-appellants therefore have not complied with the requirements of Rule 15.1(h) of the Rules of this Court, which is made applicable to cross-appeals by Rule 12.4. Rule 15.1(h) requires that a jurisdictional statement contain "[a] statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution." For this reason alone, the Court should dispense with plenary consideration of the cross-appeal and either dismiss the cross-appeal or summarily affirm the district court's judgment insofar as the cross-appeal seeks review of the district court's refusal to include additional persons in the class.

There is, in any event, no merit to this aspect of the cross-appeal. As we have explained in the jurisdictional statement (at 21-25) in No. 84-1905, the district court clearly erred in awarding relief to class members who failed to obtain judicial review within 60 days of the Secretary's "final decision" on their claims for benefits, as required by 42 U.S.C. 405(g). The district court's novel holding—under which the running of the 60-day period for seeking *judicial* review was tolled for all similarly situated claimants on a nationwide basis from the date on which a single claimant, Buenta Owens, filed a request for *administrative* reconsideration of the initial denial of her claim—is inconsistent with the text and purposes of 42 U.S.C. 405(g), the decisions of this Court, and the principles of sovereign immunity that govern the interpretation of statutory limitations on Congress's consent to suits against the federal government. As we point out in our reply brief (at 5) in No. 84-1905, cross-appellants make essentially no effort in their motion to dismiss or affirm in No. 84-1905 to rebut our submission in this regard.

If, as we submit, the district court plainly erred in including within the class any individuals who could be thought to have complied with the 60-day filing requirement only by reason of that court's novel tolling rule, it follows a *fortiori* that there is no merit to the bare assertion in this cross-appeal that the district court also should have included within the class numerous additional claimants for whom there is not even a pretense that they complied with the 60-day filing requirement, by virtue of a tolling rule or otherwise. Cross-appellants' position apparently is that a court can altogether *disregard* the explicit 60-day filing requirement that Congress has imposed as a limitation on its consent to suit under 42 U.S.C. 405(g). But even if cross-appellants were correct that this 60-day filing requirement is not jurisdictional in the strictest sense (but see 84-1905 J.S. 23-24), that conclusion would not authorize a district court simply to disregard the 60-day requirement. See *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., concurring and dissenting). Statutorily mandated limitations on the time within which a person may bring suit against the federal government must be strictly construed and enforced by the courts. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). The class certification issue presented in the cross-appeal therefore is frivolous.

2. a. The second issue cross-appellants raise—whether the district court properly denied their motion for attorney fees under the EAJA—likewise does not warrant plenary review by this Court. If this Court reverses the judgment of the district court on the Secretary's direct appeal, as we urge it to do, cross-appellants would not be "prevailing part[ies]" within the meaning of the EAJA. See 28 U.S.C. 2412(d)(1)(A). In that event, the order of the district court denying the application for attorney fees should be summarily affirmed on the ground that cross-appellants are not entitled to fees under the EAJA.

However, the Court also should summarily affirm the district court's order denying the application for fees even if this Court were to affirm the judgment of the district court, in whole or in part, on the Secretary's direct appeal. The district court denied the fee application without prejudice to cross-appellants' renewing it after this Court has ruled on the Secretary's direct appeal (85-31 J.S. App. 5a). Cross-appellants' acknowledge (85-31 J.S. 3 n.3, 13-14) that they have taken a cross-appeal from the denial of fees only as a protective measure. That course was necessitated by the controlling interpretation of the EAJA at the time the district court entered its attorney fee order. Under 28 U.S.C. 2412(d)(1)(B), a fee application must be filed "within thirty days of final judgment in the action." The Ninth Circuit held in *McQuiston* v. *Marsh,* 707 F.2d 1082, 1085 (1983), that the "final judgment" referred to in this provision is the judgment of the district court, and that a fee application therefore must be filed within 30 days of that judgment even if an appeal has been taken. According to cross-appellants (85-31 J.S. 3 n.3), they filed their application for attorney fees in this case within 30 days of the date on which the district court's judgment became final, even though the Secretary had taken a direct appeal to this Court, in order to comply with the Ninth Circuit's ruling in *McQuiston.*

After the cross-appeal was docketed in this case, however, Congress overturned the *McQuiston* rule. In Section 2 of Pub. L. No. 99-80, 99 Stat. 184—the recently enacted legislation extending the EAJA—Congress added a new Subsection (G) to 28 U.S.C. 2412(d)(2), which defines the term "final judgment" to mean "a judgment that is final and not appealable." The legislative history makes clear that under this definition, the 30-day period for filing a fee application commences with the date on which any proceedings in an appellate court are terminated. See H.R. Rep. 99-120, 99th Cong., 1st Sess. 18 n.26 (1985). Section

7(a) of Pub. L. No. 99-80, 99 Stat. 186, in turn provides that the EAJA amendments "shall apply to cases pending on * * * the date of enactment of this Act." Because this case was "pending" on the merits in this Court on the date of enactment of the EAJA amendments, this new definition of the term "final judgment" applies to this case. As a result, if this Court were to affirm the district court's holding that the relevant provisions of the Social Security Act are unconstitutional, cross-appellants would be free under the amended EAJA to submit a new application for attorney fees within 30 days of the date on which this Court's judgment became final. The district court's order denying cross-appellants' motion for attorney fees, without prejudice to their refiling after this Court has ruled, therefore should be affirmed.[2]

b. There is one issue that remains to be addressed. As cross-appellants point out (85-31 J.S. 4, 13), the Ninth Circuit held in *League of Women Voters* v. *FCC*, 751 F.2d 986 (1985), that even where a direct appeal has been taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252 from a decision of a district court holding an Act of Congress unconstitutional, an appeal from the district court's denial of an application for attorney fees under the EAJA must be taken to the court of appeals pursuant to 28 U.S.C. 1291, not to this Court pursuant to the second paragraph of 28 U.S.C. 1252. If the Ninth Circuit's decision in *League of Women Voters* were correct, then the court of appeals, rather than this Court, would have jurisdiction of cross-appellants' appeal from the district court's denial of their

---

[2]In the alternative, if the Court were to affirm the district court's judgment on the constitutional question, the Court might vacate the district court's order denying the fee application and remand with instructions to reinstate that application. The legislative history of the 1985 EAJA amendments indicates that an application for attorney fees may be filed before the "final judgment" and that the district court should hold such an application and treat it as having been filed within 30 days following the final decision. H.R. Rep. 99-120, *supra*, at 18 n.26.

application for attorney fees in this case.[3] Accordingly, if this Court agrees with the Ninth Circuit's decision in *League of Women Voters,* the Court should dismiss the cross-appeal for lack of jurisdiction insofar as it seeks review of the district court's order on the attorney fee question.

However, in our view, the court of appeals' jurisdictional holding in *League of Women Voters* is clearly wrong. The second paragraph of 28 U.S.C. 1252 provides that "[a] party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court." By virtue of this explicit language, whenever one party to a case has taken a direct appeal to this Court from a district court's holding of an Act of Congress unconstitutional, "any" subsequent appeal or cross-appeal must be taken to this Court as well. This all-inclusive language embraces an appeal from an order denying an award of attorney fees. It is irrelevant for purposes of this Court's jurisdiction that the attorney fee issue does not directly concern the constitutionality of an Act of Congress. The quoted language in the second paragraph of Section 1252 necessarily applies only to appeals and cross-appeals that do not concern the district court's constitutional holding, because any appeal or cross-appeal challenging that holding would have to be taken directly to this Court pursuant to the first paragraph of Section 1252. Moreover, this construction of the second paragraph of Section 1252 substantially furthers the interest in a "clear test" for determining this Court's jurisdiction under 28 U.S.C. 1252 (see *Heckler* v. *Edwards,* No. 82-874 (Mar. 21, 1984), slip op. 6), because it avoids the necessity under the *League of Women Voters*

---

[3]In light of *League of Women Voters,* cross-appellants in fact have taken a protective appeal to the court of appeals from the order denying their application for attorney fees. See 85-31 J.S. 3.

analysis to pick and choose among various issues to determine whether they must be appealed to this Court or to the court of appeals.

The court of appeals in *League of Women Voters* decided that the second paragraph of Section 1252 should not be construed in this manner because of this Court's holding in *Edwards* that the first paragraph of 28 U.S.C. 1252 confers jurisdiction on this Court only if the appellant actually challenges the district court's constitutional holding. See 751 F.2d at 988-989. However, the Court's decision in *Edwards* addressed the distinct threshold question of when this Court's jurisdiction under 28 U.S.C. 1252 attaches at all. Slip op. 8-15. The Court made clear that when that jurisdiction has attached—*i.e.*, when an appeal is taken pursuant to the first paragraph of Section 1252 to challenge the district court's holding of an Act of Congress unconstitutional—"the second paragraph brings before [the Court] the whole case, including appeals filed before and after the constitutional appeal." *Edwards,* slip op. 9 (footnote omitted). The Court expressly contemplated that the other issues that must come to this Court as part of the "whole case" include such "pendent" questions as the award of attorney fees. Slip op. 8, 14. Resolution of these nonconstitutional issues, the Court explained, "not only implement[s] Congress's jurisdictional intent expressed in paragraph two of 28 U.S.C. § 1252," but also results in the "just, speedy, and inexpensive determination of actions." Slip op. 9 n.12.

This approach is especially sound as regards the award of attorney fees. Eligibility for fees under the EAJA turns as an initial matter on whether the Secretary's position on the merits was "substantially justified." The fee question therefore is directly related to the merits of the controversy, including the constitutionality of the Act of Congress. Separation of powers concerns also are implicated (compare *Edwards,* slip op. 10-11, 13), because a fee application in

such a case necessarily asks the Judiciary to hold that the Executive should not even have defended the constitutionality of a statute duly enacted by Congress. See *Grace* v. *Burger,* 763 F.2d 457, 458 n.5 (D.C. Cir. 1985).

For the foregoing reasons, where a direct appeal has been taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252, this Court has jurisdiction under the second paragraph of 28 U.S.C. 1252 to hear an appeal from an order of the district court denying an application for attorney fees.

CONCLUSION

The judgment of the district court, insofar as it partially denied cross-appellants' motion for class certification, and the order of the district court denying cross-appellants' application for attorney fees should be summarily affirmed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE MCINTYRE
Attorneys

SEPTEMBER 1985

DOJ-1985-09